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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1129

MARIE HARNOIS,

Petitioner,

vs.

HUBERT A. HARNOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, SECOND DIVISION

MARIE HARNOIS
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TABLE OF CONTENTS

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented	3
Constitutional Provisions Involved	4
Relevant Facts as to Appeal No. 56449	5
Statement of the Case	5
Reasons for Granting the Writ	7
Conclusion	19
Appendix A	1a
Appendix B	13a
Appendix C	14a

List Of Authorities Cited

Cases

Adams v. Adams, 156 S.W.2d 610	8
Berry v. Rhine, 205 S.W. 2d 632	8
Brady v. Huber, 197 Ill. 291; 64 N.E. 2d 264	11

Croup v. De Mose, 138 P. 671; 78 Wash. 128 ..... 8, 9
Deke v. Huenkendier, 289 Ill. 148; 124 N.E. 381 10
De Martini v. De Martini, 385 Ill. 128; 52 N.E. 2d 138 11
Ill. State Trust Co. v. Jones, 351 Ill. 498; 184 N.E. 623 10
McKey v. McKean, 384 Ill. 112 13
Murphy v. Johnson, Civ. App. 54 S.W. 2d 158 9
Rappleye v. International Bank, 93 Ill. 396 11
Reeve v. Strawn, 14 Ill. 94 12
Rosenbaum v. Huebner, 277 Ill. 360; 115 N.E. 558 10
Ryan v. Ryan, 97 Ill. 38 10
Salmon v. Salmon, 157 P. 2d 605; 62 Ariz. 311 8
Spina v. Spina, 372 Ill. 50 12
Stambough v. Lung, 83 N.E. 922; 232 Ill. 373 9

Others

Section 1, Fourteenth Amendment, United States Constitution ..... 8, *et seq.*
Callahan's Illinois Digest, Vol. 18, p. 389, #1898 10
Callahan's Illinois Digest, p. 462 11
Callahan's Ill. Digest, Sect. 1880-1891, at p. 466 10
Illinois Civil Practice Act, Sec. 39 15
Statute of Frauds, Chapter 59, Section 7 15
21 A.L.R. 2d 589 11
128 A.L.R. 1504 11

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Petitioner, Marie Harnois, prays that a writ of certiorari issue to review the decision of the Appellate Court of Illinois, First Judicial District issued on March 27, 1973 there heard on appeal from the Circuit Court of Cook County, Illinois, County Department-Divorce Division, Honorable Edward E. Plusdrak, Judge Presiding, depriving petitioner of Fourteenth Amendment Federal Constitutional rights.

OPINION BELOW.

The opinion of the Appellate Court of Illinois, First District, Second Division, review whereof is hereby sought, is dated March 27, 1973 and is reported in 10 Ill. App. 3d. 1062 and 295 N.E. 2d. 511 and is reprinted as Appendix A.

JURISDICTION.

1. The judgment of the Appellate Court of Illinois, First Judicial District was entered on March 27, 1973.

2. Petition for Rehearing was timely filed, and was denied April 24, 1973.

3. Petition for Leave to Appeal from the Appellate Court of Illinois, First District, Second Division, to the Supreme Court of Illinois was timely filed and was denied. The Supreme Court issued its mandate on October 22, 1973, and filed October 25, 1973.

4. Affidavit to Stay Mandate of Supreme Court of Illinois was filed within the 90 day period allowed by the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED.

The questions presented upon this petition for writ of Certiorari have not been passed upon by this Court.

1. Whether the decision of the Appellate Court of Illinois finding a resulting trust in favor of plaintiff was a denial of defendant's rights to equal protection of the laws under Section 1 of the Fourteenth Amendment of the United States Constitution.

2. Whether the failure of the Appellate Court of Illinois to consider the conveyance of plaintiff's interest in the marital home as a fraudulent conveyance violated defendant's rights to due process and to equal protection of laws granted under Section 1 of the Fourteenth Amendment of the United States Constitution.

3. Whether the decision issued by the Appellate Court of Illinois finding plaintiff was not guilty of laches because of a ten year delay in asserting his claim of resulting trust was a denial of defendant's rights to due process of law under Section 1 of the Fourteenth Amendment of the United States Constitution.

4. Whether the denial by the Appellate Court of Illinois of the petition of defendant to complete the record to include the hearing of Second Supplement to Judgment for Divorce which was omitted from the record deny defendant her right to procedural due process of law under Section 1 of the Fourteenth Amendment of the United States Constitution.

5. Whether the Appellate Court of Illinois in failing to consider defendant's allegation that the Second Supplement to Judgment for Divorce which granted plaintiff certain personal items in defendant's possession was a denial of defendant's right to protection under the law of Illinois and procedural due process under Section 1 of the Fourteenth Amendment to the United States Constitution.

6. Whether the decision of the Appellate Court of Illinois finding that certain personal property in defendant's possession was a bailment to plaintiff and not a gift to defendant denied defendant her right to equal protection of the laws under Section 1 of the Fourteenth Amendment of the United States Constitution.

7. Whether the decision of the Appellate Court of Illinois denying defendant an accounting of assets purchased by joint contributions from both plaintiff and defendant, said denial being based solely on the fact of the marital relationship denied defendant her right to procedural due process and equal protection of the laws guaranteed under Section 1 of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fourteenth Amendment to the United States Constitution is set forth in Appendix B, *infra*, p. 13a.

RELEVANT FACTS AS TO APPEAL NO. 56449.

In The Appellate Court Of Illinois, First District (Second Division), Hubert A. Harnois, Plaintiff-Appellee v. Marie Harnois, Defendant-Appellant, Decision Issued On March 27, 1973, Petition For Rehearing Denied On April 24, 1973, By The Appellate Court Of Illinois "Judgment Affirmed."

Notice of Appeal to the Supreme Court of the United States from the decision issued on March 27, 1973 was filed in the Appellate Court of Illinois on January 16, 1974.

STATEMENT OF THE CASE.

The opinion of the Appellate Court is set forth in Appendix A to this Petition which includes a recitation of the facts. However, some facts are omitted and, therefore, a brief summary of the omissions is stated here. The parties were married on February 24, 1949. Two daughters were born as issue of the marriage. The older is married and Debra is a student at the University of Illinois. Plaintiff filed a Complaint for Divorce. Defendant filed an answer to the complaint and a counterclaim for separate maintenance. The trial court dismissed the counterclaim. A jury trial was conducted on the complaint which resulted in a hung jury. A second trial by jury was conducted wherein the jury found in favor of plaintiff.

The parties lived together as husband and wife from the time of their marriage until 1963 when plaintiff left the marital home and lived separate and apart for one year after which he returned home. In June, 1968 plaintiff

took up his abode in the basement. In July, 1952 the parties purchased a home in Chicago, Ill. for the sum of $15,500.00 and taking a mortgage in the amount of $10,000.00. For the two year period from 1960 to 1962 and in addition she paid a second mortgage in the amount of $4,500.00 entirely from her own earned funds.

Furthermore, after plaintiff made the conveyance of his one-half interest in the property to her she expended in excess of $20,000.00 of her own money in improvements and repairs to said home.

On May 11, 1971 the trial court entered a judgment requiring defendant to convey a one-half interest in the home to plaintiff and subsequently awarded plaintiff certain personal property located in the marital home and denied defendant's request for an accounting.

On July 6, 1971 petitioner filed a Notice of Appeal with the Appellate Court of Illinois in case No. 56449 entitled Hubert A. Harnois, Plaintiff-Appellee v. Marie Harnois, Defendant-Appellant.

On March 27, 1973 the Appellate Court of Illinois issued as its opinion "The judgment is affirmed as modified."

On April 24, 1973 the Appellate Court of Illinois denied defendant's Petition for rehearing:

Defendant filed a timely Petition for Leave to Appeal to the Supreme Court of Illinois.

On October 22, 1973 issued a mandate in this case which was filed in the Appellate Court October 25, 1973.

On January 16, 1974 Petitioner caused to be filed in the office of the Clerk of the Appellate Court an Affidavit to Stay Mandate.

REASONS FOR GRANTING THE WRIT.

The questions presented upon this petition for writ of certiorari have not been passed upon by this Court.

Substantial justice requires and demands the writ issue. If defendant is forced to return to plaintiff a one-half interest in the marital home she will suffer the loss of the $20,000.00 she spent in repair and improvement on the property. If she is not granted an accounting of assets purchased by the joint contributions she will lose one-half of $79,000.00, which is the value of these assets. She will lose the $700.00 expended by her to match the bedroom suite left in the marital home by mother of plaintiff and she will lose $200.00 expended to match the dirigold placed in the marital home by the mother.

No other mode of review is open to defendant. She has exhausted all of her avenues of review and the Supreme Court of the United States is the Court of last resort left to her. She has been denied her rights to due process and equal protection of the laws under Section 1 of the Fourteenth Amendment of the United States Constitution; and therefore, in good faith petitioner respectfully requests the Supreme Court of the United States to issue its Writ of Certiorari to the Appellate Court of Illinois to review its decision issued March 27, 1973.

I.

The Decision Of The Appellate Court Of Illinois Finding A Resulting Trust In Favor Of Plaintiff Was A Denial Of Defendant's Rights To Equal Protection Of The Laws Under Section 1 Of The Fourteenth Amendment Of The United States Constitution.

It is the contention of defendant that the record will show that the only proof offered by plaintiff that he did not intend to make a gift to defendant of his interest in the marital home was his own uncorroborated statement which was vehemently denied by defendant. Whereas, to the contrary, the conduct of the parties tends to prove that his intention was to make a gift to her. He allowed the property to remain of record in defendant's name for a period in excess of 10 years, and defendant, in reliance on this gift, expended on said property, out of her own earned funds, and without contribution from plaintiff, a sum in excess of $20,000.00 in improvements and repair. This conduct on her part is particularly notable since the original cost of the home was only $15,500.00.

The general rule is that a superior measure of proof is required to establish a resulting trust. (*Adams* v. *Adams*, 156 S.W.2d 610)

> **"a resulting trust must be established by an extraordinary degree of proof, particularly where parol evidence alone is relied on." (*Salmon* v. *Salmon*, 157 P. 2d 605; 62 Ariz. 311)**
>
> ***Berry* v. *Rhine*, 205 S.W. 2d 632 states "It is generally held that a mere preponderance of the evidence is insufficient to establish a resulting trust."**
>
> ***Croup* v. *De Mose*, 138 P. 671; 78 Wash. 128 holds "It has been held that in establishing a resulting**

trust there must be the same strict rules of proof which are required for the establishment of fraud."

"Where evidence is not satisfactory, or is capable of reasonable explanation on theories other than that of implied or resulting trust, trust is not sufficiently established to entitle beneficiary to decree declaring and enforcing it." (*Stambough* v. *Lung*, 83 N.E. 922; 232 Ill. 373)

"In order to raise a resulting trust the transaction must be honest; a resulting trust cannot arise from acts contrary to public policy or a statute (*Murphy* v. *Johnson*, Civ. App. 54 S.W. 2d 158) or in favor of the guilty person out of facts which have their origin in a fraudulent purpose, as where a person conveys property to another in fraud of his creditors."

Defendant contends that the decision of the Appellate Court was unreasonable in affirming the resulting trust in favor of Plaintiff, and that it was denial of fundamental fairness viewed in the light of the expressed fraudulent conveyance and conduct of the parties, and therefore shocking to universal sense of justice.

II.

The Failure Of The Appellate Court Of Illinois To Consider Conveyance Of Plaintiff's Interest In The Marital Home As A Fraudulent Conveyance Violated Defendant's Rights To Equal Protection Of Laws Granted Under The Fourteenth Amendent Of The Constitution Of The United States Constitution.

The parties purchased a home in joint tenancy on July 4, 1952. In 1957 plaintiff collided with a child while driving his automobile. On May 13, 1957 plaintiff conveyed

his interest in the home to defendant for no consideration in order to avoid payment of a potential liability arising from the accident. The conveyance was therefore fraudulent. The law is voluminous that he who seeks equity must do equity.

Callahan's Illinois Digest Vol. 18 page 389 #1898 defines the elements of a fraudulent conveyance as follows "In purely voluntary donations, it is fraudulent intent of donor, which vitiates the gift. If actually insolvent, he is held to knowledge of his condition, and if the necessary consequences of his acts are to hinder or defraud his creditors, the presumption of fraudulent conveyance is conclusive."

"Conveyance in fraud of creditors is void only against such persons and their representatives as may be delayed or defrauded and should not be set aside as between the parties who are equally guilty of fraud." *Deke* v. *Huenkendier*, 289 Ill. 148; 124 N.E. 381.

Rosenbaum v. *Huebner*, 277 Ill. 360; 115 N.E. 558 "A court of equity will not aid a grantor who has conveyed his property to his children to defraud creditors, by declaring a resulting or constructive trust, but will leave the parties where it finds them."

"Where a conveyance is made for purpose of hindering, delaying or defrauding creditors, equity will not interpose to restore to grantor or his heirs title to property so conveyed." *Ill. State Trust Co.* v. *Jones*, 351 Ill. 498; 184 N.E. 623.

Ryan v. *Ryan*, 97 Ill. 38; *Callahan's Ill. Digest* Sect. 1880-1891 at pg. 466 "Where a debtor has in any manner transferred his property for purpose of defrauding his creditors, and afterwards seeks as against transferee to recover back the property, equity will refuse to interfere in his behalf, since he

who comes into equity must do so with clean hands." *Rappleye* v. *International Bank,* 93 Ill. 396 "A conveyance, though fraudulent as to creditors, does not leave in grantor any equitable estate."

"Where debtor has fraudulently conveyed his real estate, he is not in any sense owner thereof and has no title thereto which he can assert, either at law or in equity." *De Martini* v. *De Martini,* 385 Ill. 128; 52 N.E. 2d 138.

Callahan's Illinois Digest at page 462 states "A.L.R. rule denying relief to one who conveyed his property to defraud his creditors as applicable where the threatened claim which occasioned the conveyance was paid or was never established." (21 *A.L.R.* 2d 589)

"Right of grantee, or his privies, to maintain suit or proceeding for affirmative relief where claim is made or anticipated that conveyance was made with intention on part of grantor, but without actual fraud by grantee, to defraud former's creditors." (128 *A.L.R.* 1504)

The Court accepted plaintiff's oral and uncorroborated statement that he did not intend to make a gift of his one-half interest to defendant against the weight of authority.

In *Brady* v. *Huber,* 197 Ill. 291; 64 N.E. 2d 264 the Court said "The rule that a parol promise to hold land in trust will be enforced in chancery where fraud has been practiced by grantee upon grantor does not apply where deed was made for the purpose of defrauding grantor's creditors."

In the instant case, had the parents of the injured child sued plaintiff, he mos certainly would have claimed

that the entire property was defendant's. Defendant contends that failure of the Court to apply the law of fraudulent conveyances appropriate to the facts in this case was palpable error resulting in material injury to her.

III.

Whether The Decision Issued By The Appellate Court Of Illinois Finding Plaintiff Was Not Guilty Of Laches Because Of A Ten Year Delay In Asserting His Claim Of Resulting Trust Was A Denial Of Defendant's Rights To Due Process Of Law Under Section 1 Of The Fourteenth Amendment Of The United States Constitution.

As to the question of laches the Appellate Court held that the ten year delay on the part of plaintiff in asking for a reconveyance was sufficiently explained by his testimony that the conveyance was to be effective only until the statute of limitations had expired on the personal injury claim. Again, this statement by plaintiff was uncorroborated by any other witness and was directly contradicted by defendant. Plaintiff's own witness, Mr. Reedy, could not recall any conversation by either of the parties as to a reconveyance after the Statute of Limitations had run.

> *Spina* v. *Spina*, 372 Ill. 50 "Nearly a century ago in *Reeve* v. *Strawn*, 14 Ill. 94 this Court well said: 'Before we transfer the title to real estate upon the strength of parol testimony alone the facts upon which such change is asked should be so convincing as to leave no reasonable doubt in the mind of the court, and not as in this case, consist of ambiguous expressions and uncertain declarations made by the party sought to be charged and testified to by witnesses after the lapse of several years.'"

Furthermore, a great inequity was perpetrated on defendant by this ruling. During this 10 year period she had spent $20,000.00 on the home without any contribution from the plaintiff. Plaintiff will reap the benefit in the increased value of the property without having made any contribution.

> *Mc Key* v. *Mc Kean*, 384 Ill. 112 at page 126 "Laches is not, like limitations, a mere matter of time but principally a question of the inequity of permitting the claim to be enforced,—an inequity founded upon some change in the condition or relation of the property and the parties."

In the instant case defendant will be greatly prejudiced if she is forced to reconvey. It is not reasonable to assume that defendant would have burdened herself with these heavy expenses if she did not believe the home was hers, particularly in view of the fact that there was no contribution from the plaintiff. It is unequitable and unjust to let plaintiff reap the advantages of enhancements made solely at the expense of defendant.

IV.

Whether The Denial By The Appellate Court Of Defendant's Petition To Complete The Record So As To Include The Hearing Of The Second Supplement To Judgment For Divorce Denies Defendant Her Right To Procedural Due Process Under Section 1 Of The Fourteenth Amendment Of The United States Constitution.

The Transcript of Proceedings of May 11, 1973 was omitted from the record. Upon discovery of the omission defendant petitioned the Appellate Court to complete the record under Rule 329 of the Supreme Court of Illinois rules. Said petition was denied.

Testimony given at that hearing concerned personal property left in the marital home by mother of plaintiff. The effect of the denial of that petition was that the Appellate Court was forced to rule on an incomplete record and defendant was prejudiced because the court had no means of verifying her allegation that said personal property were gifts to her, nor of verifying the fact that she spent $900.00 to buy matching pieces to go with the personal property plaintiff's mother left with the parties.

V.

Whether The Decision Of The Appellate Court Of Illinois Finding That Certain Personal Property In Defendant's Possession Was A Bailment To Plaintiff And Not A Gift To Defendant Denied Defendant Her Right To Equal Protection Of The Laws Under Section 1 Of The Fourteenth Amendment Of The United States Constitution.

The articles left by plaintiff's mother with the parties consisted of a bedroom suite, china and dirigold. At the time the mother left the personal property in the home of the parties she also gave the defendant the sales slips for these articles which were the only existing evidence of title. In order to constitute a bailment title to the property must remain in the bailor. In the present case title was surrendered to defendant, and, in reliance upon that title, defendant expended $700.00 to buy matching bedroom furniture; $500.00 for a breakfront to house the china. Further she gave consideration to mother of plaintiff in the form of a Maytag washer, a bedspread and paid the drayage charges.

This personal property was placed in the home of the parties by plaintiff's mother in 1963. Said mother made no

request for its return until 1971 and consequently is barred by the Statute of Frauds, Chapter 59, Section 7 which provides:

> "Where any loan of goods and chattels shall be pretended to have been made to any person, with whom, or those claiming under him, possession shall have remained for the space of five years, without demand made and pursued by due process of law, on the part of the pretended lender, or where any reservation or limitation shall be pretended to have been made of a use or property by way of condition, reservation, remainder or otherwise, in goods or chattels, the possession whereof shall have remained in another as aforesaid, the same shall be taken, as to creditors and purchasers of the person aforesaid so remaining in possession, to be fraududent, and that the absolute property is with the possession, unless such loan, reservation or limitation of use or property were declared by will or deed in writing, proved and recorded as aforesaid."

Defendant further contends that the finding by the Appellate Court that Chattels left in possession of defendant from 1963 until 1971 with no attempt on the part of plaintiff nor his mother to claim them disregarded the bar of the Statute of Frauds and the Statute of Limitations, and in the absence of the complete record was a violation of the Illinois Civil Practice Act Sec. 39. The determination by the Court that the chattels were a bailment without knowledge or inquiry as to who possessed the title to the bedroom suite and is at present in the possession of defendant. This decision was arbitrary and discriminatory because in a bailment title does not pass to bailee, but remains in bailor.

VI.

The Decision Of The Appellate Court Of Illinois Denying Petitioner An Accounting Of Funds And Assets Accumulated By The Parties Through Their Joint Contributions Was A Denial Of Defendant's Right To Due Process Of Law And A Denial Of Her Right To Equal Protection Of The Laws Under Section 1 Of The Fourteenth Amendment Of The United States Constitution.

The Appellate Court upheld the judgment of the trial court that the court is not in a position to unravel an accounting between husband and wife. The Appellate Court held that inasmuch as defendant freely and voluntarily used her earnings for family expenses and there was no agreement between the parties for repayment defendant has shown no right to the funds used by plaintiff in his financial dealings.

Defendant has worked all of her married life except during pregnancies and a confinement for surgery. During most of the period of her employment the earnings of the parties have been substantially equal. Early in their married life the parties set a financial goal for themselves which they hoped to accomplish within 20 years after their marriage.

Because of their combined earnings and frugalities they had accumulated approximately $79,000.00 worth of assets, consisting of stocks, real estate and savings accounts toward which both contributed substantially equal amounts. Prior to the time of the trial plaintiff secreted all of these assets and was unable to account for where the funds were then located.

It is of these funds that defendant is asking the accounting and not for family expenses paid by her. De-

fendant freely and voluntarily used her earnings for family expenses, not because of an agreement by plaintiff to repay her, but in furtherance of their 20 year goal. She also contributed to the purchase of the assets of the parties.

The parties deposited their money in a joint safe deposit box from which plaintiff removed the contents. The sum of approximately $79,000.00 has been secreted by plaintiff. These monies were not his alone but were the results of the joint labors, savings and frugalities of both parties and were a result of the marriage relationship. Plaintiff would never have possessed such assets were it not for the contribution of defendant.

Yet, she was refused an accounting solely because of the marital relationship. It is a safe assumption, that under these same circumstances, if the parties were not husband and wife, defendant would not have been denied her accounting. It is also a reasonable assumption, that if defendant had the same financial arrangement with a person, not her husband, defendant also would not be denied an accounting.

Defendant has a right not to be deprived of her property without due process of law. She is also entitled to equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States. The denial of the court to give defendant is based on the fact of the marital relationship. It is unreasonable to deny defendant an accounting of funds to which she contributed because of her marital relationship with plaintiff. Surely the law cannot be that married women are denied an accounting of funds to which they contributed and other

women have no such prohibition. Such a decision is against public policy and is discriminatory against a particular class. A policy that may have been justifiable 40 or 50 years ago under conditions then existing is wholly unreasonable.

A judgment for accounting should have been given even though the assets were unavailable at the time. Said judgment might be collectable at some future date.

The decision of the Appellate Court of Illinois denying defendant an accounting of funds and assets accumulated by the parties through their joint contributions was a denial of defendant's right to due process of law and a denial of her right to equal protection of the laws under Section 1 of the Fourteenth Amendment of the United States Constitution.

CONCLUSION.

For these reasons Petitioner respectfully prays that this Court issue its Writ of Certiorari to the Appellate Court of Illinois, First Judicial District, to review its decision issued on March 27, 1973, and for such other and further relief as to this Honorable Court shall seem meet and just.

Marie Harnois

Petitioner Pro se

State of Illinois
County of Cook—ss

Marie Harnois, being first duly sworn on oath, deposes and says she has read the foregoing Petition for Writ of Certiorari by her subscribed, she knows the contents thereof, and the same is true in substance and in fact, and that this Petition is filed in good faith.

Marie Harnois

Petitioner pro se

Subscribed and sworn to before me this
16th day of January, 1974.

Notary Public

APPENDIX "A"

Opinion of the Appellate Court of Illinois

Mr. Presiding Justice Stamos delivered the opinion of the court.

Defendant, Marie Harnois, appeals from a supplement to a judgment of divorce which declared the property rights of the parties. She contends:

1. The trial court erred in ordering her to convey a one-half interest in the marital home to plaintiff since he had previously made a gift of such interest to her;
2. It was error to determine the rights of plaintiff's mother in personal property located in the marital home since she was not a party to the action;
3. The trial court erred by not allowing defendant's request for an accounting; and
4. The trial court erred in placing a limit on the amount of child support payments to be made by plaintiff without a similar limitation for her.

The parties were married on February 24, 1949. Two daughters, Geri and Debra, were born as issue of the marriage on October 26, 1950 and April 10, 1953, respectively, When judgment was entered Geri was married and Debra was 18 years of age and a student at the University of Illinois.

Plaintiff filed a complaint for divorce on July 2, 1968 alleging mental cruelty. Defendant filed an answer to the complaint and a counterclaim for separate maintenance. The trial court dismissed the counterclaim. A jury trial

was conducted on the complaint, the jury found in favor of plaintiff and a judgment of divorce was entered. Thereafter a hearing on the matters of property distribution and child support was conducted by the trial court.

Plaintiff is a sergeant with the Chicago Police Department. He earns approximately $14,700 per year. Defendant is a school teacher employed by the Chicago Board of Education. She earns approximately $15,900 per year and has been gainfully employed in one capacity or another throughout the period of the marriage except during pregnancies and a confinement for surgery.

The parties purchased a home in joint tenancy on July 4, 1952. In 1958 plaintiff collided with a child while driving his automobile. Thereafter on May 13, 1958 plaintiff conveyed his interest in the home to defendant for no consideration. Both parties continued to reside in the home and plaintiff continued to make the mortgage installment payments thereon until at least 1968.

On May 11, 1971 the trial court entered a supplement to the judgment of divorce which required defendant to convey a one-half interest in the home to plaintiff. The court further ordered that both parties contribute one-half of the college expenses of their daughter Debra, but limited plaintiff's expenditures therefor to $1000 per year. In a second supplement to the judgment the court awarded plaintiff certain personal property located in the marital home and ordered defendant to allow its removal therefrom.

Defendant initially contends that the trial court erred in ordering her to convey a one-half interest in the marital home to plaintiff. She argues that when plaintiff conveyed

his interest as joint tenant in the property to her in 1958 such conveyance raised the presumption of a gift and plaintiff failed to present sufficient evidence to overcome the presumption. Plaintiff contends, and the trial court found, that no gift was intended by the conveyance, thereby giving rise to a resulting trust in favor of plaintiff.

Our Supreme Court has stated in *Scanlon* v. *Scanlon*, 6 Ill.2d 224, 229-231:

> "The principal question, so far as the real estate is concerned, is the sufficiency of the evidence to establish a resulting trust in one half of the real estate in favor of plaintiff. The applicable rules of law have been frequently stated. Such a trust is created by operation of law from the presumed intention of the parties. [Citing cases] In its most common application, a resulting trust arises from the fact that the consideration for the purchase of land is furnished by one person while the title is taken in the name of another. [Citing cases] • • • The burden of proof is upon the party seeking to establish a resulting trust, and the evidence, to be effective for this purpose, must be clear, convincing and unmistakable. [Citing cases]
>
> • • •
>
> Where a husband purchases real estate and takes title in his wife's name, there is a presumption of gift or advancement. [Citing cases] This presumption of fact, [Authority cited] however, is not conclusive. The intention of the parties governs. [Authority cited] • • • If the proof discloses that it was not the intention of the parties that the conveyance was to be deemed a gift or advancement, equity will effectuate

the intention of the parties by declaring a resulting trust. [Citing cases]"

In the instant case plaintiff conveyed his interest as joint tenant in the real estate to defendant for no consideration. Thus plaintiff furnished the sale consideration for the conveyance. This transaction raised a presumption that plaintiff intended to make a gift or advancement of his interest in the property to defendant. Plaintiff then assumed the burden of proof of rebutting the presumption by showing through clear and convincing evidence that he did not intend the conveyance to be a gift or advancement. Plaintiff adduced evidence to prove that the conveyance was made to avoid payment of a potential liability arising out of an automobile mishap that he had been involved in. The conveyance was made shortly after the mishap. He testified that the conveyance was made with the understanding that there would be a reconveyance after the Statute of Limitations had run on the personal injury claim. Defendant testified that plaintiff had told her that he was giving her the property.

The trial judge, who had the opportunity to observe the witnesses as they testified, was in a superior position to assess the weight and credibility to be afforded their testimony. He found that a gift was not intended by the conveyance and that, therefore, a resulting trust was created in favor of plaintiff. We will not disturb that finding since it is not contrary to the manifest weight of the evidence.

Defendant further argues that, even if the evidence was sufficient to establish a resulting trust, plaintiff is estopped by laches from so asserting. She urges that plaintiff's delay in asserting his rights under the resulting trust has caused

her prejudice in that she has expended large sums of money on improvements to the property in reliance on what she believed to be a gift thereof.

Laches has been defined as such neglect or omission to assert a right, taken in conjunction with a lapse of time and other circumstances causing prejudice to an adverse party, as will operate as a bar in a court of equity. *Carlson* v. *Carlson*, 409 Ill. 167. Circumstances tending to explain or excuse delay in asserting one's rights should be considered in determining whether laches will bar assertion of those rights. *Wright* v. *Wright*, 242 Ill. 71.

The facts in the instant case show that plaintiff continued his residence at the property in question, there was no adverse possession by defendant, and the parties were husband and wife until this litigation arose. Plaintiff further explained the delay in asserting his rights under a resulting trust by testifying that the property was conveyed to avoid payment of a liability arising from a possible personal injury claim by the child and that the conveyance was to be effective only until the statute of limitations had expired on the claim, whereupon the property was to be reconveyed to the parties as joint tenants. Under these circumstances we agree with the trial court that plaintiff's delay was sufficiently explained so that laches would not bar him from asserting his rights under a resulting trust.

Defendant next contends that the trial court erred by determining the rights of plaintiff's mother to certain personal property in defendant's possession since plaintiff's mother was not a party to the action. Plaintiff contends that he held the disputed items for his mother. The trial court found "[t]hat the [personal] property in question

is not the property of the defendant." The trial court awarded the property to plaintiff and ordered defendant to allow its removal from her residence.

The trial court did not determine rights of a person not a party to the action. Plaintiff's evidence established that he held the personal property as bailee for his mother and, therefore, had a right to possession thereof superior to that of defendant. Although defendant alleged that the personalty was given to her as a gift the trial court specifically found to the contrary. Such finding was not against the manifest weight of the evidence.

Defendant next insists that the trial court erred by not allowing her request for an accounting. She argues that since she was gainfully employed during the marriage and used her earnings for family necessaries plaintiff was able to use his income for the purchase and sale of real estate and stocks. Defendant alleges that plaintiff concealed these transactions from her and, therefore, she is entitled to an accounting.

In *Spalding* v. *Spalding*, 361 Ill. 387, 395 our Supreme Court stated:

> "We are of the opinion that the weight of authority supports the principle that for payments voluntarily made by the wife for family expenses during the time the husband and wife are living together, in the absence of proof of a specific agreement for re-payment by the husband, the law does not create an indebtedness of the husband to the wife. [Cases cited]. Public policy, ever interested in the maintenance of a harmonious marriage relation, prohibits a contrary rule. It would be disastrous to marital felicity where the

parties have maintained a plane of living for both and in which the husband has acquiesced, where such expense has been voluntarily assumed and freely borne by the wife, to require the husband, after the lapse of years, to account to the wife for such expenditures so made by her."

Inasmuch as defendant freely and voluntarily used her earnings for family expenses and there was no agreement between the parties for repayment defendant has shown no right to the funds used by plaintiff in his financial dealings. Absent such proof it is our opinion that the trial court correctly denied her request for an accounting.

Defendant finally contends that it was error to place a limit on the amount of child support limitation for defendant. We agree.

Payment of educational costs of children is provided for in Ill. Rev. Stat. 1969, ch. 40, par. 19, which provides in pertinent part:

"When a divorce shall be decreed, the court may make such order touching * * * the care, custody and support of the children * * * as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just * * * and shall make such order touching the care, custody, support and education of the minor children of the parties or any of them as shall be deemed proper and for the benefit of the children. The court may order the husband or wife, as the case may be, to pay to the other party such sum of money * * * as the court deems equitable.

* * *

(Appellate Court Opinion)

> The court may, on application, from time to time, terminate or make such alterations in the allowance of alimony and maintenance and the care, education, custody and support of the children, as shall appear reasonable and proper and the court has jurisdiction after such children have attained majority age to order payments for their support for educational purposes only."

In the case at bar the trial court ordered both parties to contribute one-half of the college expenses of their daughter Debra, but limited plaintiff's expenditures therefor to $1000. We are of the opinion that the financial circumstances of the parties do not differ so greatly as to justify a limitation on the support obligation of one party and not the other. Therefore, pursuant to Supreme Court Rule 366, we will order that the judgment be modified to remove the limitation placed upon plaintiff's educational support obligation. Both parties will remain obligated to pay one-half of the educational costs of their daughter Debra.

The judgment is affirmed as modified.

Affirmed.

LEIGHTON, J., concurs,
HAYES, J., Specially concurring.

Hayes, J., specially concurring:

I concur in all respects with the opinion of the court. More specifically I concur in the policy reason given for denying defendant-appellant's claim for a credit for the amount by which the improvements and repairs to the realty involved enhanced the value of that realty at the

time of the entry of the decree of divorce in favor of plaintiff-appellee. This special concurrence is designed to point out an additional conceptual basis for that denial, using familiar concepts in the law of property held in joint tenancy.

We have held herein that the conveyance by appellee to appellant of his joint tenant interest in the residence was not a donative conveyance and that, under the circumstances, appellant must have known that there was no donative intent. Hence, appellee retained, by way of resulting trust, the equitable joint tenant interest in the realty, and appellee and appellant were equitable joint tenants during the period subsequent to the conveyance. It follows that appellee and appellant have at all times held their home as joint tenants: legal prior to the conveyance, and equitable thereafter.

The order herein directing, as a part of the property settlement decreed between the parties incident to the entry of the decree of divorce in favor of appellee, that the premises be sold within 90 days and the proceeds be equally divided between the parties has the same effect as would a decree of partition entered in favor of appellee.

Appellant had made certain improvements and repairs to the residence, for which she used her own funds. The basic thrust of appellant's position is that, since this situation is equivalent to a partition between joint tenants, she should be credited on final accounting for the improvements and repairs for which she alone had paid out of her own funds.

(Appellate Court Opinion)

Were this a partition between joint tenants as between whom *neither* was under any legal duty to support the other, then the contributing covenant would be prima facie entitled to a credit. *Bayley* v. *Nichols* (1914), 263 Ill. 116, 104 N.E. 1054. And it would be given irrespective of whether or not the non-contributing joint tenant had been under any *legal* duty to contribute. The basic reason is that, as between *such* joint tenants, there exists no rebuttable presumption that the improver and repairer had made the improvements and repairs with a donative intent.

Where, however, the joint tenants are husband and wife, a very different situation is presented. The difference is best illustrated by first using a fact situation which does not involve improvements or repairs, namely, the fact situation in which realty is purchased and legal title to that realty is taken by husband and wife in joint tenancy, but the purchase money was provided solely by one of the spouses out of his or her own funds. In that situation, there exists as a matter of law a strong rebuttable presumption that the spouse furnishing the consideration has done so with the intent thereby to make a gift to the joint tenant interest to the non-contributing spouse; and clear and convincing evidence is required to rebut that presumption, so as to establish instead that the non-contributing spouse is holding his or her joint tenant interest upon a resulting trust for the contributing spouse. *Walker* v. *Walker* (1938), 369 Ill. 627, 17 N.E.2d 567; *Spina* v. *Spina* (1939), 372 Ill. 50, 22 N.E.2d 687.

These *joint tenancy* cases can be distinguished on the facts (though concededly the distinction is a bit tenuous)

from cases in which one spouse furnishes the entire consideration out of his or her own funds, but legal title is then taken *solely* in the name of the non-contributing spouse. In that situation the presumption of gift will arise *only* when the consideration has been furnished by the husband. When, on the other hand, the consideration has been furnished by the wife, then a rebuttable presumption of resulting trust will arise, exactly as it would have had the parties not been related as husband and wife. *Wright* v. *Wright* (1909), 242 Ill. 71, 89 N.E. 789; *Lutyens* v. *Ahlrich* (1923), 308 Ill. 11, 139 N.E. 50; and, for a review of such cases, see *Peters* v. *Meyers* (1951), 408 Ill. 253, 96 N.E.2d 493. The reason given for the rule in the latter fact situation is that the husband is under a legal duty to support the wife (which he is presumed to have been fulfilling in part by the conveyance), whereas the wife is under no legal duty to support the husband.

Whether or not this concededly tenuous distinction is adequate to reconcile the cases, the fact is that the distinction as to the presumption of gift or of resulting trust based upon the incidence of the legal duty to support *was not* applied in the fact situation in which the contributing and non-contributing spouses both take title to the realty as joint tenants. *Walker* v. *Walker* (1938), 369 Ill. 627, 17 N.E.2d 567; *Spina* v. *Spina* (1939), 372 Ill. 50, 22 N.E.2d 687. (We note further that reservations have been expressed as to whether the said distinction has any present-day social utility: "Both the law and current social mores cast doubt on these historical attitudes." *Peek* v. *Peek* (1971), 131 Ill.App.2d 1045 at 1047, 268 N.E.2d 443). The one case in which the said distinction may *appear* to have

been applied to the joint tenancy situation between spouses (*Maurican* v. *Haugen* (1944), 387 Ill. 186, 56 N.E. 2d 367) is itself easily distinguishable by the fact that in that case the wife did not know that the release executed by the security holder of the realty conveyed the realty to husband and wife in joint tenancy; her ignorance of that fact made it impossible to say that there was any presumption of a gift by her to the husband.

Turning now from the illustrative fact situation (involving transfers of legal title) to the fact situation in the instant case (involving credit for improvements and repairs), we inquire whether the presumption of gift which exists when legal title is taken between spouses in joint tenancy carries over to the situation in which improvements and repairs have been made at the sole expense of one spouse while the realty is being held by them in joint tenancy (whether legal or equitable). We conclude that it does. *Stromsen* v. *Stromsen* (1947), 397 Ill. 260, 73 N.E.2d 272, as construed in *Bowman* v. *Pettersen* (1952), 410 Ill. 519 at 532, 102 N.E.2d 787; dictum in *Lutticke* v. *Lutticke* (1950), 406 Ill. 181, 92 N.E.2d 754.

The conclusion is, therefore, that in this case there exists, as a matter of law, a rebutable presumption that appellant, when she made the improvements and repairs with her own funds, did so with donative intent.

That presumption can be rebutted only by evidence which is clear and convincing. The only evidence in this case which is available to rebut the presumption of gift is the reference by appellant to a marital arrangement by which appellant would use her own funds to maintain the

household while appellee would use his own funds to establish and develop a retirement fund for the benefit of both spouses. We conclude that this evidence falls short of the standard of clear and convincing evidence which is required to rebut the presumption of gift.

Hence, appellant is not entitled to any credit in this property settlement for the enhanced value of the realty by reason of the improvements and repairs which she had made with her own funds.

APPENDIX "B"

UNITED STATES CONSTITUTION

Amendment XIV (U.S.C.A. Const. Amend. 14)

Due Process of Law
Equal Protection of the Laws

Sec. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "C"

October 22, 1973

TO ATTORNEYS OF RECORD AND PARTIES:

You are hereby notified that the mandates in the cases listed below were today issued to the appropriate Appellate Court Clerks.

Justin Taft
Clerk of the Supreme Court

• • • • •

No. 45889—Hubert A. Harnois, respondent, vs. Marie Harnois, petitioner. Leave to appeal, Appellate Court, First District.

• • • • •

FEB
MICHAEL ROBAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1129

MARIE HARNOIS,

Petitioner,

vs.

HUBERT A. HARNOIS,

Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT, SECOND DIVISION

MARIE HARNOIS
3550 W. 84th Place
Chicago, Illinois 60652
Petitioner Pro Se

FORM 210

APPENDIX "D"

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

Present The Honorable John J. Stamos Presiding Judge.

Present The Honorable George N. Leighton Judge.

Present The Honorable John C. Hayes Judge.

Leslie V. Beck
Clerk.

Richard J. Elrod
Sheriff.

Hubert A. Harnois,
Appellee

No. 56449 vs.

Marie Harnois,
Appellant

Appeal from the Circuit Court of Cook County
(No.68-D-11628)

Petition of Appellant for Rehearing is Denied.

Entered: April 24th, 1973

CERTIFICATE

I certify that this is a copy of the order of the Appellate Court, First District.

February 20th, 19 74

Leslie V. Beck
Clerk of Court

APPENDIX "E"

United States of America

State of Illinois
Supreme Court } ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the tenth day of September in the year of our Lord, one thousand nine hundred and seventy-three, within and for the State of Illinois.

PRESENT: ROBERT C. UNDERWOOD, CHIEF JUSTICE

JUSTICE WALTER V. SCHAEFER — JUSTICE THOMAS E. KLUCZYNSKI

JUSTICE DANIEL P. WARD — JUSTICE CHARLES H. DAVIS

JUSTICE JOSEPH H. GOLDENHERSH — JUSTICE HOWARD C. RYAN

WILLIAM J. SCOTT, ATTORNEY GENERAL

WILLIAM G. LYONS, MARSHAL

ATTEST: JUSTIN TAFT, CLERK

Be It Remembered, that, to-wit: on the 26th day of September 1973, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

Hubert A. Harnois,

Respondent

No. 45839 vs.

Marie Harnois,

Petitioner

Petition for Leave to Appeal from Appellate Court
First District
56449
68 - D - 11628

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by him *in this behalf expended, to be taxed, and that* he *have execution therefor.*

I, JUSTIN TAFT, *Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.*

In Witness Whereof, *I have hereunto subscribed my name and affixed the Seal of said court this* 22nd *day of* October *, 19*73.

Clerk,
Supreme Court of the State of Illinois.